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FIQH AND ADAPTATION TO SOCIAL REALITY

Introduction

In addition to attempting a general survey of *fiqh,* this essay formulates a response to the basic question whether Islamic law has the capability and resources, and if so of what kind, to accommodate social change. The essay is presented in eight parts. The initial two sections address the definition of *fiqh* and *sharīʿah* and delineate the salient differences between them. The third section briefly looks into the history of *fiqh,* and this is followed by a description of the major themes and subject matter of this discipline. Section five addresses the methodology and sources of *fiqh* and the formulae that are devised for the deduction of the rules of *fiqh* from their sources. The next section develops the theme that the textual sources of *fiqh,* namely the Qurʾān and Sunnah, integrate a certain degree of flexibility within the fabric of their laws and remain open to the possibilities of interpretation and *ijtihād* (independent reasoning). Section seven discusses recent developments and measures that are taken to facilitate easy access to the source materials of *fiqh;* it also describes recent reforms, introduced in many Muslim countries, that represent new developments in *fiqh.* The last section attempts a brief discussion of *ijtihād* in the context of modern statutory legislation and explores the ways as to how the resources of *fiqh* and *ijtihād* could more effectively be utilized in the on-going efforts at legal reconstruction and reform.

I. Definition

Literally *'fiqh'* means knowledge or understanding especially of that which is not self-evident and requires a certain degree of intellectual exertion to comprehend. It is defined as knowledge of the practical rules of *sharīʿah* which are deduced from their particular *(tafṣīlī)* evidence in the sources. The revealed sources of *sharīʿah,* namely the Qurʾān and Sunnah, provide the basic evidence from which the rules of *fiqh* are deduced through the application of juristic reasoning and *ijtihād.* The use of reasoning as a precondition here precludes knowledge of the obvious rules of *sharīʿah,* such as the number of daily prayers, from the purview of *fiqh.* It also precludes revealed knowledge such as the knowledge of the Prophet, as well as the knowledge of a total imitator *(muqallid)* which does not involve understanding through the application of reason.

To say that *fiqh* is concerned with the practical rules of *sharīʿah* means that the rules of *fiqh* relate to the conduct and daily activities of the individual and this would preclude the knowledge, for example, of dogmatic theology *(uṣūl al-dīn)* as well as knowledge of the methodology and sources of *fiqh (uṣūl al-fiqh),* from the definition of *fiqh.* The practicalities of conduct are evaluated on a scale of five values ranging from the obligatory *(wājib)* to recommendable *(mandūb),* permissible *(mubāḥ),* reprehensible *(makrūh)* and forbidden *(ḥarām).* To say that the practical rules of *fiqh* are deduced from the source materials of *sharīʿah* means that the rules of *fiqh* may not be obtained from non-*sharīʿah* sources such as mathematics and history. Deducing the rules of *fiqh* from the detailed evidence in the sources also implies direct contact with the source materials of *sharīʿah* and the ability to carry out *ijtihād.* When a *faqīh* (one who is learned in *fiqh*) fulfils the requirements of this definition, he or she is according to the *ʿulamāʾ* of *uṣūl al-fiqh,* in the meantime a *mujtahid* (one who is able to conduct *ijtihād*). The *ʿulamāʾ* of *uṣūl* have thus equated the *faqīh* and *mujtahid* to one another. The *ʿulamāʾ* of *fiqh* on the other hand include in the definition of *faqīh* one who acquires knowledge of the practical rules of *sharīʿah* even without the ability to deduce them directly from their sources.[1]

II. *Sharīʿah* and *Fiqh*

Sharīʿah is often used interchangeably with *fiqh.* However, there are differences between them which have often been ignored. As can be seen from the definition of *fiqh,* is a derivative knowledge which obtains its substance from the *sharīʿah.* Since *fiqh* consists of knowledge of the practical rules of *sharīʿah,* these rules must necessarily precede *fiqh. Sharīʿah* may be defined as the totality of guidance that God has revealed to the Prophet Muḥammad pertaining to the dogma of Islam, its moral values and its practical legal rules. *Sharīʿah* is thus a broader concept which comprises in its scope not only the practical legal rules of *fiqh* but also dogmatic theology *(ʿilm al-kalām)* and moral teachings *(ʿilm al-akhlāq).* Dogmatic theology is mainly concerned with belief *(ʿaqīdah)* in the fundamentals of Islam and a sense of enlightened conviction in its values. *ʿIlm al-akhlāq* educates the individual to exercise self-discipline and restraint in the fulfillment of natural desires and inculcates a sense of commitment to

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[1] Sayyid al-Sharīf al-Jurjānī, *Kitāb al-Taʿrifāt* (Istanbul, al-Astanah, 1327 H), p. 222; Sayf Din al-Āmidī, *Al-Iḥkām fī Uṣūl al-Aḥkām,* ed. ʿAbd al-Razzāq ʿAfifi, 2nd ed. (Beirut: Al-Maktab al-Islāmī, 1402/1982), I, p. 5: Muḥammad Muṣṭafa Shalabī, *Al-Fiqh al-Islāmī Bayn al-Mithāliyyah Waʾl-Wāqiʿiyyah* (Beirut: Al-Dār al-Jamiʿiyyah liʾl-Tabaʿah waʾl-Nashr, 1402/1982), p. 112: ʿUmar Sulaymān al-Ashqar, *Tārikh al-Fiqh al-Islāmī* (Beirut: Maktabah al-Falāḥ, 1402/1982), p. 16.

moral virtue. The *ʿulamāʾ* are, generally, in agreement on the primacy of *ʿaqīdah* and *akhlāq;* by comparison to these, *fiqh* is a mere superstructure and a practical manifestation of the dogma and morality of Islam.[2]

Fiqh and *sharīʿah* are interrelated as they both originate in the same sources, namely the Qurʾān and Sunnah, the main difference between them being that *sharīʿah* is founded in divine revelation (*waḥy*) whereas *fiqh* is a product largely of the juristic interpretation of scholars and their understanding of the general guidance of *waḥy. Sharīʿah* lays down the basic structure of values and *fiqh* extends the general guidance and message of *sharīʿah* to issues which have not been regulated in the Qurʾān and Sunnah. The rules of *fiqh* thus occur in two varieties: Firstly, rules which are founded in clear textual injunctions, such as rules pertaining to the essentials of worship, rules that prohibit marriage between close relatives and rules that apply to criminal conduct such as murder, adultery and theft. This part of *fiqh* is simultaneously a part of the divine *sharīʿah.* Secondly rules which are deduced through intellectual exertion and *ijtihād,* these are not necessarily a part of the *sharīʿah* and a *mujtahid* who has reason to depart from it in favor of an alternative ruling may do so without incurring a transgression. *Fiqh* develops the *sharīʿah* in light of the changing conditions of society through the modality of *ijtihād,* but the harmony of *fiqh* and *ijtihād* with the principles of *sharīʿah* is not always certain. Only when the ruling of *ijtihād* is supported by general consensus *(ijmāʿ),* or by the ordinance of the lawful government and the *ūlū al-amr* does that ruling acquire the binding force of *ḥukm sharīʿah* (valid ruling of *sharīʿah*). It thus appears that the clear injunctions of the Qurʾān and Sunnah on the *ḥalāl* and *ḥarām* constitute the common feature of both *sharīʿah* and *fiqh.* But *fiqh* is an embodiment largely of speculative thought and *ijtihād,* and it is, as such, an open and unfinished chapter of the *sharīʿah* that is amenable to further development and growth.[3]

ʿAllāma Mawdūdī has described the *sharīʿah* as 'the supreme law' that is contained exclusively in the Qurʾān, and the teachings of the Prophet, that is his Sunnah, which explains and clarifies the Qurʾān. "The Sunnah together with the Qurʾān constitutes the *sharīʿah.*"[4] Mawdūdī has evidently precluded the juristic legacy of *fiqh* from the purview of *sharīʿah.* Muḥammad Asad has even further confined the scope of *sharīʿah* by saying that it consists only of the clear injunctions of the Qurʾān and Sunnah, which are expounded in positive legal terms, known as the *nuṣūṣ.*

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[2] *Cf.* ʿAbd al-Karīm Zaydān, *Al-Madkhal li-Darāsah al-Sharīʿah al-Islāmīyyah,* 8th ed. (Baghdad: Maktabah al-Quds, 1405/1985), p. 39; Muṣṭafa Aḥmad al-Zarqa, *Al-Madkhal al-Fiqhī al-ʿĀm* (Damascus: *Dār al-Fikr,* 1968), I, p. 29.

[3] *Cf.* Abū Isḥāq Ibrāhīm al-Shāṭibī, *Al-Muwafaqāt fī Uṣūl al-Sharīʿah,* ed. Shaykh ʿAbd Allah Dirāz (Cairo: Al-Maktabah al-Tijāriyyah al-Kubra, n. d.), I, p. 31; Zaydān, n. 2, p. 66.

[4] S.A. Mawdūdī, *The Islamic Law and constitution,* 5th ed. (Lahore: Islamic publications Ltd., 1974), p. 69.

It is the *nuṣūṣ* of the Qur'ān and Sunnah which constitute "the real eternal *sharī'ah*."[5] Muḥammad Khidr al-Ḥusayn, the late Shaykh of Al-Azhar, concurred with the substance of this analysis when he wrote that the *sharī'ah* has enacted a certain number of clear and specific rules; as for the rest, it has provided general guidelines and methods for the qualified scholar and *mujtahid* to deduce the rules of law in relationship to particular issues.[6]

In view of the rapid pace of developments in science and civilization, the need is evident for widening the scope of new research in *fiqh,* which might mean, in turn, that the speculative and changeable dimension of *fiqh* is likely to expend even further. The proximity or otherwise of future development in *fiqh* to the basic guidance of *sharī'ah* will remain to be seen as the criterion of its validity, and the emphasis is likely to be more on the basic objectives and values of *sharī'ah* rather than on technical conformity to its letter. But continuity of values on the one hand and accommodation of necessary changes on the other will remain to be the common concern of both *sharī'ah* and *fiqh.*

III. An Historical Sketch

The history of Islamic law is, in a real sense, a history of *fiqh,* rather than that of *sharī'ah,* for the latter is basically ahistorical as its revelation began and came to an end during the lifetime of the Prophet. *Fiqh* did not exist during this period, which might explain why the distinction between *sharī'ah* and *fiqh* is a relatively late development. The two terms were initially synonymous and although a distinction was subsequently made between them, *sharī'ah* remained the dominant influence which often subsumed and overshadowed the *fiqh.* For about a century following the demise of Prophet (632 A.D.), the word *'fiqh'* was vaguely being used in reference not only to legal rules but also to dogmatic theology, *Ḥadīth, tafsīr* and mysticism. The emphasis in the initial stages of Islamic scholarship was neither on *sharī'ah* nor on *fiqh* as such but on reading and memorizing the Qur'ān and the transmission and preservation of *Ḥadīth,* and it is the *Ḥadīth* which began to be the principal preoccupation of the *'ulamā'.* This is perhaps indicated by the fact the some of the earliest works on record, such as the *Muwaṭṭa'* of Imām Mālik (d. 179/795) has often been characterized as a work of *Ḥadīth* rather than *fiqh. Ḥadīth* continued to be the main focus of attention during the third century Hijrah, even in preference to *tafsīr.* Note for example that the first major work

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[5] Muḥammad Asad, *The Principles of State and Government in Islam* (Los Angeles: California University, press, 1961), p. 14.

[6] Muḥammad Khidr al-Ḥusayn, *Al-Sharī'ah al-Islāmiyyah Salihah li-Kull Zaman wa Makan,* ed. Alī Riḍā al-Tunisi, (Damascus: Al-Matba'ah al-Ta'awuniyyah, 1391/1971), p. 58.

on *tafsīr* (that of al-Ṭabarī) was completed at around the early fourth century Hijrah. According to Ibn Khaldūn, the activity of extracting rules pertaining to the conduct of the *mukallaf* (legally competent person) from the sources of *sharīʿah* was called *fiqh* but persons who did this were initially known as *'al-qurrā'* (readers) as distinguished from those who could not read the Qurʾān. Then literacy and knowledge of the Qurʾān became widespread and the designation *'al-qurrā'* gave way to *'al-fuqahā'.'*[7] *Fiqh* in the early period referred to the knowledge of religion in general and the distinction in its definition which confined *fiqh* to the practical legal rules of *sharīʿah* was made by the *ʿulamāʾ* of the later periods, that is after the establishment of the schools of law. This was a result partly of the efflorescence of during the era of *ijtihād,* which was in turn stimulated by the documentation of *Ḥadīth* and the extensive material that was consequently made available for new developments in *fiqh.* In his renowned work *al-Fiqh al-Akbar* (the greater *fiqh*) we note that Imām Abū Ḥanīfah (d. 150/767) mainly discussed dogmatic theology and devotional matters and yet be designated his work as 'the greater *fiqh.*' On a similar note, Abū Ḥanīfah defined *fiqh* as "the individual's knowledge of his own rights and obligations." This definition once again did not confine the scope of *fiqh* to practical legal rules pertaining to conduct but tended to have a wider application.

Fiqh has undergone various phases of development and decline which may be summarized into six: In its initial phase, that is the prophetic period (c. 610-632 C.E.) the Qurʾān was revealed and the Prophet enhanced its knowledge through his own teaching and Sunnah which laid down the rudiments of the legal science of *fiqh.* But this period saw little if any development in speculative *ijtihād* because the Prophet himself provided definitive rulings on issues as and when they arose—hence the redundancy of *ijtihād.*

The second period, the era of the companions (c. 632-661 C.E.), is one of interpretation and supplementation of the textual subject matter of the law and it was in this period that *fiqh* and *ijtihād* find their historical origins. Leading figures among the companions, especially ʿUmar b. al-Khaṭṭāb, ʿAlī b. Abū Ṭālib, ʿAbd Allah Ibn Masʿūd, ʿĀishah, Zayd b. Thābit, ʿAbd Allah b. ʿAbbas and many others took an inherently rational and comprehensive approach toward the Qurʾān and Sunnah. Their understanding and interpretation of the text was not confined to the meaning of words but read into their underlying rationale, effective cause and purpose. Their precedent, verdict and *fatwā* is generally considered authoritative not only because they were the direct recipients of the prophetic

[7] ʿAbd al-Raḥmān Ibn Khaldūn, *Muqaddimah* (Cairo: Matbaʿah al-Taqaddum, 1322/1943), p. 353; see also al-Ashqar, *Tārīkh al-Fiqh,* n. 1, p. 14.

teachings and carriers of his Sunnah but also because of the calibre of their *ijtihād* and the liberality and latitude that they exhibited in the interpretation of *sharīʿah.*

The third phase of *fiqh,* known as the era of the Followers *(tābiʿūn)* began with the coming into power of the Umayyads and terminated with the ending of that dynasty (c. 661-750 C.E.). Due to the territorial expansion of the Ummayad state, Islam came into contact with other traditions and new issues were encountered as a result which stimulated significant developments in *fiqh.* This period is marked by the emergence of two distinctive scholastic tendencies which have left a lasting impact on the subsequent developments of *fiqh.* These were the *Ahl al-Ḥadīth* (traditionist) who were centered mainly in the birthplace of Islam, namely Mecca and Medina in the Ḥijāz, and the *Ahl al-Raʾy* (rationalists) who were active in the hinterland of Islam, namely the Iraqi critics of Kūfa and Baṣra. While the former relied mainly on the textual authority of the Qurʾān and Sunnah and were averse to the use of personal opinion *(raʾy),* the latter were inclined, in the absence of a clear text, toward a more liberal use of rationality and personal opinion in the development of *fiqh.* The traditionists were opposed to taking an inquisitive approach to the understanding of the text, but the rationalists maintained that the rules of *sharīʿah,* outside the sphere of devotional matters, pursued certain objectives *(maqāṣid)* and were founded in identifiable causes *(asbāb wa ʿilal)* which provided the jurist with significant guidelines for further enquiry and research.[8]

The fourth phase, known as the era of *ijtihād,* witnessed major developments in *fiqh* which were manifested in the emergence of the later schools of law, namely the Ḥanafī, Mālikī, Shāfiʿī, Ḥanbalī and Jaʿfarī, that have survived to this day. This period it also distinguished with the burgeoning of juristic activity and compilation of prolific and voluminous writings in *fiqh.*[9] I have highlighted the salient contributions of these schools in my discussion of the methodology and sources below.

The next phase in the history of *fiqh* began around the fourth century Hijrah and it is one of decline and imitation *(taqlīd)* in which the *ʿulamāʾ* discouraged original *ijtihād* and preoccupied themselves with elaboration and commentaries on the works of the leading Imams and scholars of the past. By far the longest in the history of *fiqh,* this period lasted for about nine centuries which witnessed the downfall of the ʿAbbāsid and Ottoman empires, expansion of the military and political powers of the West, industrial revolution and colonial domination of Muslim lands by Europe-

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[8] *Cf.* Shalabī, n. 1, p. 199: Muḥammad Salām Madkūr, *al-Fiqh al-Islāmī,* 2nd ed. (Cairo: Matbaʿah al-Fajālah, 1955), p. 82.

[9] *Cf.* Madkūr, *Al-Fiqh,* n. 8, p. 53; al-Ashqar, *Tārīkh al-Fiqh,* n. 1, p. 41 ff.

ans. The colonial powers propagated and practised their own methods and doctrines and put into effect their own legal codes. *Fiqh* as a result lost its originality and contact with social reality and underwent a most tenacious period of stagnation and decline whose negative legacy still remains to be the main challenge and preoccupation of the Muslims of twentieth century.

The last phase in the history of *fiqh* which currently continues began around the turn of the twentieth century marking the end of the long period of stagnation and *taqlīd*. I have discussed the main developments in *fiqh* during this phase in a subsequent section under consolidation and reform. Suffice it here to note that this period began with a clarion call by the *ʿulamāʾ* for a return to original thinking and *ijtihād* and the quest once again to make *fiqh* a relevant proposition to the social reality and experience of contemporary Muslims. The revivification of *fiqh* and its necessary adjustment to reflect the prevailing conditions of society is generally seen as an essential component of the Islamic resurgence of the recent decades.

IV. Major Themes

The jurists are on the whole in agreement over the binary division of the rules of *fiqh* into *ʿibādāt* (devotional matters) whose principal objective is exaltation and worship of God, and earning or reward in the hereafter—and *muʿāmalāt* (civil transactions) whose main objective is realization of benefit to mankind. But the detailed arrangement and classification of subjects under these two headings, and addition of new categories beyond these, tend to vary from one *madhhab* (legal school) to another.

The Ḥanafīs have classified the rules of *fiqh* into the three categories at *ʿibādāt, muʿāmalāt* and *ʿuqūbāt* (penal law). Each of these are in turn subdivided into five main headings. The *ʿibādāt* thus discuss under cleanliness and obligatory prayer, fasting, legal alms, the pilgrimage of Ḥajj, and holy struggle *(jihād)*. It is quite typical of almost all the major works of *fiqh* to begin with a detailed exposition of the rituals and practical rules of *ʿibādāt*. The *muʿāmalāt* are subdivided into the five headings of transactions involving exchange of values *(al-muʿawaḍāt al-māliyyah)*, equity and trusts *(al-amānāt)*, matrimonial law *(al-munākāḥāt)*, civil litigations *(al-mukhāṣamāt)* and administration of estates *(al-tarikāt)*. And lastly the *ʿuqūbāt* are studied under the three headings of just retaliation *(qiṣāṣ)*, proscribed offences *(ḥudūd)* and discretionary penalties *(taʿzīrāt)*.[10]

The Shāfiʿīs divide the *juris corpus* of *fiqh* into four parts, namely the *ʿibādāt*, which pertain to one's well-being in the hereafter; the *muʿāmalāt*,

[10] Muḥammad Amīn Ibn ʿAbidin, *Hāshiyah Radd al-Mukhtār ʿAla Durr al-Mukhtār*, 2nd ed. (Cairo: Muṣṭafa al-Bāby al-Ḥalaby, 1386/1966), I, p. 56.

which relate to one's survival in this world; the *munākaḥāt* which concern the survival of the species; and the *ʿuqūbāt* which concern the survival of society and civilization.

Without entering into details, the Ḥanbalī classification of the themes of *fiqh* resembles that of the Shāfiʿī, albeit with minor differences of placing certain subheadings under a different category or context. The Mālikī jurist Ibn Juzay has subdivided each of the *ʿibādāt* and *muʿāmalāt* into ten titles (and two hundred subtitles), some of which are not included under either by the other schools.[11]

Notwithstanding such attempts at classification, the *fiqh* remains, in some parts at least, to be wanting in greater consolidation of themes. Note, for example, the somewhat atomistic style in which the classical jurists have expounded the law of contract. Instead of articulating the basic principles and common themes of all contracts, the jurists have studied each contract individually. The Ḥanafī jurist, al-Kāsānī, has thus dealt with nineteen nominate contracts and the manner they are treated leaves the reader speculating as to

(a) whether these could all be consolidated so as to highlight the features they all have in common;

(b) whether the *fiqh* validates contracts other than these; and

(c) whether there is a need for a general theory of contract on the basis merely of a mutual agreement that does not violate the principles of morality and public interest.[12]

Unlike the *muʿāmalāt* and *ʿādāt* (customary matters) which are open to rational enquiry and the application of such concepts as ratiocination (*taʿlīl*, q.v.) analogical reasoning *(qiyās)* and juristic preference (*istiḥsān*, q.v), the norm in *ʿibādāt* is that the textual rulings of *sharīʿah* are followed at face value. The precise causes and rationale of *ʿibādāt* are only known to God and His commands and prohibitions in this area are followed as a matter of devotion and unquestioning submission to Him. The *sharīʿah* provides specific instructions on *ʿibādāt*, but with reference to *muʿāmalāt*, it is mainly concerned with an exposition of the basic objectives and general principles which are open to rational enquiry and often provide a starting point for further development.

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[11] Muḥammad b. Aḥmad Ibn Juzay, *Qawānīn al-Aḥkām al-Sharīʿiyyah* (Cairo: ʿĀlam al-Fikr, 1975) (see table of contents); ʿAbd al-Wahhāb Abū Sulaymān, *Tartīb al-Mawduʿāt al-Fiqhiyyah wa Munasabatuh fīl-Madhābib al-Arbaʿah* (Makkah al-Mukarramah: Jāmiʿah Ummal-Qura, 1408/1988), p. 17 ff; Al-Ashqar, *Tārīk al-Fiqh*, n. 1, p. 22.

[12] *Cf.* ʿAbd al-Razzāq al-Sanhūrī, *Maṣādir al-Ḥaqq fīl-Fiqh al-Islāmī* (Cairo: Maʿhad al-Buḥūth w'l-Dirāssāt al-ʿĀliyyahʿ, 1967), I, p. 78.

V. Methodology and Sources

Fiqh is for the most part an embodiment of *ijtihād* and its development is related in direct proportion to the exercise of original thought and independent personal opinion *(raʾy)* of the qualified *mujtahid.* To ensure propriety in *ijtihād,* the *ʿulamāʾ* developed the methodology of *usūl al-fiqh* which is basically concerned with the provision of a set of rational guidelines for the development of *fiqh* and the deduction of its rules from the source materials of *sharīʿah.* And yet it is ironical that the methodology of *uṣūl,* which we shall presently examine, regulated and encouraged *ijtihād* on the one hand but also set into motion a trend, almost from the outset, of increasingly subjecting *ijtihād* to a variety of restrictions. The end result of articulating an elaborate methodology was in a way self-defeating as instead of encouraging originality and envelopment, it seems to have encourage the opposite. The so-called closure of the gate of *ijtihād* was not an unrelated phenomenon. It occurred because the *ʿulamāʾ,* for a variety of reasons, went too far on the route of technicality and literalism to develop, instead of a balanced methodology, an overimposing edifice which tended to impede rather than encourage originality in *ijtihād.*

The fact that the companions were not bound by an elaborate methodology and procedure enabled them to exercise *ijtihād* in its original and pioneering spirit. They took their lead directly from the Qurʾān and Sunnah and exerted themselves in pursuit of public benefit *(maṣlaḥah).* Their precedent and verdict *(fatwā),* often arrived at through consultation and consensus, inspired respect from the next generation of *ʿulamāʾ;* the latter were often emulated, in turn, by their followers in the succeeding generation, and this paved the way for the development of *ijmāʿ* (general consensus) as the third source of law next to the Qurʾān and Sunnah. The succeeding generations of *ʿulamāʾ* (i.e. the *tābiʿūn*) further developed the existing legacy of the companions but they were faced, unlike the companions, with a more complex picture of developments. This was manifested in the territorial expansion of the Umayyad state, the influence of foreign traditions, the emergence of an exceeding plurality of schools and sects, and also of self-styled *mujtahids* of questionable competence. These developments were seen by the *ʿulamāʾ* as a threat to the unity of the *ummah* and the integrity of its *sharīʿah*—hence the need for a methodology to regulate *ijtihād.*

Although there was general agreement on the overriding authority of the Qurʾān and Sunnah, there were differences among the schools on the methods they proposed for the development of *fiqh* and the scope which they acknowledged for the use of personal opinion *(raʾy).* The *Ahl al-Ḥadīth* normally referred to explicit text and sought solutions to new issues through textual interpretation, but when they failed to find a text,

they tended to exercise restraint and preferred to abandon further enquiry. The *Ahl al-Raʾy,* especially the Ḥanafīs, on the other hand, were inclined to extend the scope of enquiry into the rationale and purpose of the text through the modality of analogical reasoning *(qiyās).* As a method of reasoning, *qiyās* operated on the basis of an effective cause *(ʿillah),* which was found to be in common between an old case and a new case. The *Ahl al-Ḥadīth* did not agree at first and were critical of reliance on analogy as a basis of legislation. The debate over *qiyās* was concerned mainly with the identification of the proper *ʿillah* and the uncertainty that was inherent in this exercise.[13] *Qiyās* represented a salient feature of the methodology of *uṣūl* so much so that Imām al-Shāfiʿī equated *ijtihād* and *qiyās* with one another and attempted in this way to narrow down the wider scope of *ijtihād* by identifying *qiyās* as the only valid manifestation thereof. Notwithstanding its rich contribution to the development of *fiqh, qiyās* was not devoid of difficulties. Even the chief protagonists of *qiyās,* namely the Ḥanafīs, took the view that analogical reasoning could lead to rigidity and fail to engender fair and equitable solutions to problems. For a direct extension of a given ruling to a similar but not identical situation could lead to undesirable results. The need was thus felt for a new formula to overcome the rigidities of *qiyās.* The Ḥanafīs who were the main advocates of *raʾy* and *qiyās,* also developed the doctrine of juristic preference *(istiḥsān)* which enabled the jurist and *mujtahid* to search for a more equitable solution in the event where the application of *qiyās* frustrated the ideals of equity and justice. This was often arrived at through a deeper investigation that relied either on an alternative but more subtle analogy (i.e. *qiyās khaffī*) or by making an exception to the ruling of a difficult *qiyās* in order to provide a better solution.[14] But the Ḥanafīs once again met with opposition and their new doctrine was often described as a form of indulgence in personal preferences. Imām al-Shāfiʿī, the leading voice of the *Ahl al-Ḥadīth,* came out strongly in support of *qiyās,* which he saw as an extension of the rulings of the Qurʾān and Sunnah to new issues, but he totally rejected *istiḥsān* and called it an arbitrary exercise that circumvented the *sharīʿah* through reliance on questionable opinions.[15]

Although *istiṣlāḥ* (consideration of public interest-also known as *maṣlaḥah*) is not a scholastic doctrine per se, the Mālikī School has nevertheless taken a leading role in advocating it as a basis of legislation. *Istiṣlāḥ* is not scholastic because it derives its authority from the Qurʾān, which is

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[13] Further details on the construction of *qiyās* and relevant illustrations can be found in M.H. Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Islamic Texts Society, 1991), pp. 197-229.

[14] For details on *istiḥsān* see the previous note at pp. 245-267.

[15] Muḥammad b. Idrīs al-Shāfiʿī, *Kitāb al-Umm* (Cairo: Dār al-Shaʿb, 1321 H.), VII, p. 271.

emphatic on the realization of public benefit. Although the other schools have also recognized *maṣlaḥah* as a source of law, yet because of its strong utilitarian learning, they have generally tended to impose a variety of conditions on it, so much so that it could no longer be seen as an independent proof. Only Imām Mālik has advocated *maṣlaḥah* as a source of law in its own right which is why it is regarded a Mālikī contribution to the methodology of *uṣūl al-fiqh.* Whereas analogy operated within the given terms of the existing law, and juristic preference basically corrected its irregularities, *maṣlaḥah* was not bound by such limitations and it vested the ruler and the *mujtahid* with the initiative to take all necessary measures, including new legislation, in order to secure what they considered to be of benefit to the people. Provided that the *maṣlaḥah* in question was general, as opposed to an individualist or sectarian interest, that it was genuine and pursued the valid objectives of *sharīʿah,* and that it did not violate any of its textual injunctions—it was a valid basis of legislation.[16]

Almost every major school proposed a new principle or method in order to regulate *ijtihād* and ensure its conformity with the overriding authority of divine revelation. Whereas some *ʿulamāʾ,* such as the Ẓāhirīs, confined the sources of law to the Qurʾān, Sunnah and *ijmāʿ,* the Ḥanafīs added *qiyās, istiḥsān* and custom (*ʿurf,* to which the Mālikīs in turn added *istiṣlāḥ,* and blocking the means *(ṣadd al-dharāʾiʿ).* In bare outline, *ṣadd al-dharāʾiʿ* ensured the consistency of means and ends blocking thereby the attempt to use a lawful means towards an unlawful end—such as the sale of arms at the time of conflict. Although some of the obvious applications of this doctrine were generally accepted, the Mālikī school has applied it more widely than most. Imām al-Sharīʿi's (d. 205/820) unique contribution to *uṣūl al-fiqh* is manifested in his *Risālah,* which is the first work of authority on the subject that advanced the knowledge of the Qurʾān and Sunnah to a new stage and articulated the legal theory of *uṣūl al-fiqh* in much the same ways as it is today. The Shāfiʿīs have also contributed the doctrine of *istiṣḥāb,* or presumption of continuity, which contemplates continuity and predictability in law and in court decisions by proposing that facts and rules of law and reason are presumed to remain valid until there is evidence to establish a change. A mere claim or doubt that there might be a change is of no account and should therefore not affect continuity in the structure of the *aḥkām.*[17]

These doctrines are all designed, each in their respective capacity, to relate the *sharīʿah* to social reality, to serve as instruments of adaptation, and provide formulae for finding solutions to new issues. The methodol-

[16] For details on *Maṣlaḥah* see M.H. Kamali "Have We Neglected the *Sharīʿah* Law Doctrine of Maṣlaḥah?" *Islamic Studies* 27 (1988), pp. 287-304.

[17] For details on *istiṣḥāb* see Kamali, *Jurisprudence* n. 13, pp. 297-310.

ogy that they propose is also designed to ensure the conformity of *fiqh* to the basic principles and philosophy of *sharīʿah.* The idea that the law must evolve lies at the root of all of these doctrines. What would be the use otherwise of analogical reasoning, general consensus, and juristic preference etc., if the law were to be closed to evolution? An obvious conclusion that can be drawn from the very existence of an elaborate methodology must therefore be that the *sharīʿah* is open to development through the application of that methodology.

VI. Adaptability and Change

Fiqh consists for the most part of the interpretation of those parts of the Qurʾān and Sunnah which are amenable to interpretation and can be related to new situations. Rational enquiry and investigation is not only encouraged in the Qurʾān but derive substance from the presence; on a large scale, of the general *(ʿām)* and speculative *(ẓannī)* provisions in the Qurʾān as well as the fact that the Qurʾān validates ratiocination *(taʿlīl)* as a basic premise of its legislation. I shall briefly address each of these as follows:

1. General Themes of the Qurʾān

Although the Qurʾān contains specific rules on such matters as marriage, divorce, inheritance, and crimes, provisions of this kind occupy a relatively small portion of its legal contents. Out of an approximately five hundred legal verses in the Qurʾān only a small proportion is conveyed in the form of specific provisions, the rest are all concerned with general principles.[18] A great deal of the general *(ʿām)* in the Qurʾān has been specified by the Qurʾān itself, or by the Sunnah, or the scholarly interpretation of commentators.[19] But even so, since the Qurʾān is largely devoted to an exposition of general principles, its language is often versatile and dynamic, which means that the text can often be interpreted and given a concrete meaning in conjunction with particular issues. When we read, for example, the proclamation that "God permitted sale and prohibited usury" (2:275), or that "God does not intend to impose hardship upon people" (5:6); or the command addressing the believers to "fulfil your con-

[18] There is disagreement on the precise number of *āyāt al-aḥkām* (legal verses) in the Qurʾān. Whereas al-Ghazzālī (*Al-Mustaṣfa,* II, 101) estimated these at 500, ʿAbd al-Wahhāb Khallāf (*ʿIlm Uṣūl al-Fiqh,* p. 32) has given them at 350 verses the reason for such differences is the perspective of the researcher. It is quite possible that a *mujtahid* may derive a legal rule from a nonlegal passage or that averse may be regarded as a legal verse by some and nonlegal by others.

[19] For details see "Al-Fiqh," in *Al-Mawsūʿah al-Fiqhiyyah* (Kuwait: Wizārat al-Awqāf waʾl-Shuʾūn al-Islāmīyyah, 1987), I, p. 19 ff.

tracts" (5:1); and another command to "devour not each other's property in vain, unless it be through lawful trade by your mutual consent" (4:29); or the statement that everyone is responsible for his own conduct and "no soul shall be burdened with the burden of another" (6:164); or the address to the believers to "obey God and obey the Messenger and those who are in charge of affairs," (4:59) or the preceding text in the same Sura (4:58) addressing the believers to "render the trusts *(al-amānāt)* to whom that they belong and when you judge among people, you judge with justice;" and then the ruling which requires that community affairs must be conducted through consultation (3:159) and the address to the believers to "cooperate in pursuit of good works and piety and cooperate not in hostility and sin" (5:2) and so forth—the text is in each case concerned with laying down a basic norm and a general principle which may well relate to new developments issues and conditions in the life of the community that were not experienced before. Although no law can be said to have a sense of reality if all of it were devoted to generalities, yet the Qurʾān is seen mainly as a source of general guidance and inspiration rather than of specific rules and procedures. "Every scholar who has resorted to the Qurʾān in search of solution to a problem," commented al-Shāṭibī, "has found in the Qurʾān a principle that has provided him with some guidance on the issue." Al-Shāṭibī also observed that "the specific rulings of the Qurʾān are often related to a better understanding of its general principles."[20] It is undoubtedly the general principle of the Qurʾān that has given it a certain quality of permanence as well as substance for an ever-increasing series of commentaries and interpretations.

2. The Speculative *(ẓannī)* in the Qurʾān

Legislation in the Qurʾān occurs in two varieties, namely definitive *(qaṭʿī)* and speculative *(ẓannī)*. The former refers to a definitive injunction which is self-evident and clear without any recourse to interpretation. The specific shares that the Qurʾān assigns to legal heirs, the prohibited degrees of relations in marriage, and the obligatoriness of prayer and fasting etc., are all conveyed in this form. Clear injunctions of the Qurʾān lie at the core of the *sharīʿah*, but since they are in no need of interpretation, *fiqh* has little role to play in regards to them, except for the possibility perhaps that an analogy may be based thereon.

A legal text is classified as speculative when the language of the text is not self-evident in meaning and cannot therefore be applied without recourse to interpretation and *ijtihād*. When the Qurʾān declares, for ex-

[20] Abū Isḥāq Ibrāhīm al-Shāṭibī, *al-Muwafaqāt fī Uṣūl al-Sharīʿah*, ed. Muḥammad Ḥasānay Makhlūf (Cairo: Matbaʿah Salāfīyyah, 1341), III, p. 219.

ample, that "forbidden to you (in marriage) are your mothers and your daughters..." (4:23)—this is basically a definitive injunction in regards to the prohibitions that it conveys, but even the definitive text here has a speculative aspect. The question thus arose as to whether the word "daughters" include illegitimate daughters and step daughters, and if so whether they are entitled to inheritance. Similar questions have arisen with respect to a whole range of legal injunctions. Even in regards to such basic prohibitions as murder, adultery and theft, questions arise as to the precise definition of these, and whether, in the case of theft, for example, stealing from the dead, or pick-pocketing, fit the standard definition of the offence. The answers that are given to such questions are a matter of disagreement among the schools of *fiqh.* By far the larger portion of the legal contents of the Qur'ān is speculative with respect to meaning although the whole of the Qur'ān is definitive in respect of authenticity.[21] Most of the Sunnah, on the other hand, has reached us by means of solitary reports of odd individuals, known as *Aḥād Ḥadīth.* Reports of this kind are speculative in authenticity and transmission even if they may convey a clear meaning. The *Aḥād Ḥadīth* as such cannot establish a definitive injunction of *sharī'ah* unless, of course, its content is supported by the Qur'ān or by general consensus *(ijmā').*[22]

It is due partly to the presence of speculative provisions in the Qur'ān and Sunnah that the *sharī'ah* remains open to interpretation and reconstruction. The *'ulamā'* of the various schools have taken different approaches to interpretation, to the implications of the general and the specific *('ām, khāṣṣ),* and such other issues as the occurrence or otherwise of abrogation *(naskh)* in the Qur'ān as well as the precise meaning and implications of commands and prohibitions in the text. While some, like the Ẓāhirīs, have taken a literalist approach and upheld only the clear and immediate meaning of the text, the majority have taken a broader view of interpretation and have gone beyond the confines of words, to include the logical implications and rationale of a legal text as an integral part of their approach to its understanding.[23]

3. Ratiocination *(Ta'līl)*

When we compare Qur'anic legislation to a modern statute, we note that the textual rulings of the Qur'ān are not confined to a series of com-

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[21] *Cf.* Yūsuf al-Qaraḍāwī, *Sharī'ah al-Islām Ṣāliḥah li'l-Tatbīq fī Kull Zamān wa Makān* (Cairo: Dār al-Ṣahwah 1494 H.), pp. 137-38; Muḥammad Tawfīq Uwaydah, *Al-Fiqh al-Islāmī Asas al-Tashrī'* (Cairo: Matabi' al-Ihrām al-Tijāriyyah 1391/1971), p. 189.

[22] *Cf.* Muṣṭafa Aḥmad al-Zarqā, *Al-Madkhal al-Fiqhī al-'Ām* (Damascus: Dār al-Fikr, 1986).

[23] There is a chapter on abrogation and another on commands and prohibitions in Kamali, *Jurisprudence,* n. 13, pp. 149-68.

mands and prohibitions and their immediate consequences but often espouse an appeal to the reason and conscience of the individual. The Qur'ān expounds on numerous instances and in a large variety of themes, both legal and nonlegal, the rationale, cause, objective and purpose of its text, the benefit or reward that accrues from conformity to its guidance or the harm and punishment that may follow from defying it. This aspect of the Qur'ān, known as *ta'līl,* is also manifested in the affirmative stance that the Qur'ān takes to the exercise of sound reasoning and judgement, and in the frequent references that it makes to those who think, who enquire into the world around them and investigate, those who possess knowledge and draw rational conclusions from their observations. The *'ulamā'* were thus able to conclude that the wider implications and objectives of the Qur'ān which are often indicated but not always elaborated in the text should be investigated and comprehensively understood. *Ta'līl* is not valid with regard to devotional matters, but outside this sphere the *sharī'ah* encourages investigation and enquiry into its rules. Ratiocination in the Qur'ān means that the laws of *sharī'ah* are not imposed for their own sake, nor for want of mere conformity to rules, but that they aim at the realization of certain benefits and objectives. When the effective cause, rationale and objective of an injunction is properly ascertained, they serve as basic indicators of the continued validity of that injunction, which means that the injunction in question stands or falls in accordance with its effective cause *('illah).* Thus when a ruling of *sharī'ah* outside the sphere of *'ibādāt* no longer serves its original intention and purpose, then it is the proper role of the *mujtahid* to substitute it with a suitable alternative, and failure to do so would mean neglecting the objective *(maqsud)* of the Lawgiver.[24] Among the instances of *ta'līl* in the Qur'ān we note, for example, in reference to just retaliation *(qiṣāṣ)* the proclamation that "in *qiṣāṣ* there is (saving of) life for you, O you men of understanding" (2:179). Similarly the prohibition of wine-drinking and gambling is premised on the rationale of preventing "hostility and rancor" among people and interference with the remembrance of God (5:91). Legal alms and charities are levied in order to prevent the concentration of wealth among the rich (57:7). With reference even to the prophethood of Muḥammad, God Most High justifies it by proclaiming that "We have not sent thee but a mercy to mankind" (21:10). Mercy *(raḥmah)* in this text and communication *(balāgh)* (5:92) and warning *(tandhīr)* in other places (22:49) thus explain the rationale and objectives of prophethood. These and other instances of *ta'līl* in the Qur'ān has led the Shāfi'ī jurist 'Izz al-Dīn 'Abd al-Salām to

[24] *Cf.* Muḥammad Amīn (known as Āmir Badshah), *al-Taysīr Sharḥ al-Taḥrīr* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1983), I, p. 360; Shalabī, *Al-Fiqh,* n. 1, p. 131, al-Nabhān, *Al-Madkhal,* n. 33, p. 402.

the conclusion that "the *sharīʿah* is premised on securing benefit for the people and none of the *ʿulamāʾ* has opposed this. As for the Zāhiriyyah, they too have endorsed this in principle except that they do not agree with ratiocination in the sense of assigning specific causes for textual injunctions."[25] Al-Shāṭibī has similarly observed that the rules of *sharīʿah* concerning civil transactions and customary matters *(muʿāmalāt wa ʿādāt)* follow the benefits on which they are predicated. The *sharīʿah* may forbid something because it is devoid of benefit but it permits the same when it secures a benefit. A deferred sale, for example, of a dirham for a dirham is forbidden because of the fear of usury *(ribāʾ)* but a period loan is permitted because it secures a *maṣlaḥah* (deferment is harmful in one and beneficial in the other).[26]

We find in the precedent of the companions instances where some of the rulings of Qurʾān and Sunnah were suspended or replaced because they no longer secured the benefit and objective for which they were initially introduced. Thus the Caliph ʿUmar al-Khaṭṭāb suspended the share of the *muʾallafah al-qulūb* in the *zakāt* revenues. These were persons of influence whose cooperation was important for the victory of Islam. The Qurʾān (9:60) had assigned a share for them which the caliph discontinued on the ground, as he stated, that "Allah has exalted Islam and it is no longer in need of their support." The caliph thus departed, on purely rational grounds, from the letter of the Qurʾān in favor of its general purpose and "his ruling is in harmony with the spirit of the Qurʾān."[27] We also note the *Ḥadīth* in which the Prophet declined a request by some companions, made at a time of price hikes in commodities, to introduce price control *(al-tasʿīr)* in the market of Medina on the ground as the Prophet expounded that this might amount to an unfair imposition *(maẓlamah)* on the traders. But the change of circumstances some sixty years later prompted the *ʿulamāʾ* of Medina to validate price control on precisely the ground of similar apprehensions as the Prophet had expressed—to prevent unfair trading and abuse—albeit that this time the harm was feared to affect the community as a whole. According to another report, the Prophet's widow, ʿĀishah reversed the ruling of the *Ḥadīth* which had allowed women to attend the mosque for congregational prayers, stating as her reason that owing to the spread of corruption, the Prophet would have done the same had he been alive.[28] Once again, I may add, that due to the change of

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[25] ʿIzz al-Dīn ʿAbd al-Salām, *Qawāʿid al-Aḥkām fī Maṣāliḥ al-Anām,* ed. Ṭāha ʿAbd al-Rauf Saʿd (Cairo: Maktabah Kulliyyat al-Azhariyyah, 1968), p. 5.

[26] Al-Shāṭibī, *Muwafaqāt,* n. 20, II, p. 305.

[27] ʿAbd al-Raḥmān Taj, *Al-Siyāsah al-Sharʿiyyah waʾl-Fiqh al-Islāmī* (Cairo: Maṭbaʿah Dār al-Taʾlif, 1373/1953), p. 28; Zaydān, *Al-Madkhal,* n. 2, p. 122.

[28] For details on both of these examples see Yūsuf al-Qaraḍāwī, *Al-Ijtihād fiʾl-Sharīʿah al-Islāmiyyah* (Kuwait: Dār al-Qalam, 1406/1985), pp. 120-2.

conditions in our own time, the prevailing custom seems to permit women's participation in almost all walks of life and it would no longer make sense that the mosque should now be the only place where women should not attend. The specific cause and argument may vary in each case but the basic rationale in all of these is the people's benefit and *maṣlaḥah* which, as we learn from the precedent of companions, lay at the root of the whole idea of *taʿlīl*. It was only at a later stage when the jurists (especially the Ḥanafīs and Shāfiʿīs) departed from the *maṣlaḥah*-based *taʿlīl* toward the more technical concept of *ʿillah*. But even so *ʿillah* was still grounded in the basic notion of *maṣlaḥah* albeit that the jurists began to stipulate conditions of a technical nature to ensure that the *ʿillah* in question secured its underlying *maṣlaḥah*.[29] I shall not pursue this discussion any further than saying perhaps that in their methodology of *qiyās* the Mālikīs and Ḥanbalīs have validated the concept of *ḥikmah* (objective, rationale) as a substitute for *ʿillah* and the basic difference between them is that *ḥikmah* is less technical than *ʿillah* and more closely associated with *maṣlaḥah*.[30]

To summarize, the occurrence of *taʿlīl* in the Qurʾān, Sunnah and the precedent of the companions and the prominence that it takes in the conduct of *ijtihād* clearly indicates that Islamic Jurisprudence, outside the sphere of *ʿibādāt*, is rationalist in essence and premised on a set of higher values such as justice and *maṣlaḥah*, which constitute the basic objective and rationale of all of its legal injunctions.[31] *Taʿlīl* and *ijtihād* must, of course, be guided by the textual injunctions *(nuṣūṣ)* of *sharīʿah* but since *maṣlaḥah* is the overriding goal and objective of *sharīʿah*, the *nuṣūṣ* should not be read in isolation from it. A technical and plausible reading of the *nuṣūṣ* which is oblivious to the public welfare and inspired only by considerations of conformity and literalism should therefore be avoided.[32]

VII. Consolidation and Reform

A problem that has hampered the efforts toward the revival of *fiqh* and *ijtihād* in light of contemporary conditions has been over accessibility. This is because the bulk of scholastic *fiqh* is contained in voluminous works of medieval origin and style. These works, which are generally in Arabic, are also poorly classified and focus occasionally on issues that are no longer relevant to the experience of the Muslim community in modern times. Another difficulty with these abundantly rich and eru-

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[29] *Cf.* Shalabī, *Al-Fiqh*, n. 1, p. 166, al-Qaraḍāwī, *Al-Ijtihād*, n. 28, p. 157.

[30] For more details on *ʿillah* and *ḥikmah* see Kamali, *Jurisprudence*, n. 13, p. 207 ff.

[31] For details on the basic objectives of *sharīʿah (maqāṣid al-sharīʿah)* see M.H. Kamali "Sources, Nature and objectives of *Sharīʿah*," *The Islamic Quarterly* 33 (1989), pp. 215-35.

[32] *Cf.* al-Nabhān, *Al-Madkhal*, n. 33, p. 401.

dite works is manifested in their tendency toward scholastic isolation often amounting to a disregard for the contribution of the other schools. The Ottoman *Mejelle* of 1876 was an attempt by the Turkish government and *ʿulamāʾ* to codify and make easily accessible the Ḥanafī *fiqh* of *muʿāmalāt*. After some seven years of preparation, the *Mejelle* was completed in 1851, consisting of an introduction and sixteen chapters. The *Mejelle* did not cover the area of family law which is why it was followed in 1917 by the promulgation in Turkey of the Law of Family Rights. This law utilized the resources not only of Ḥanafī *fiqh*, but of the other three schools more widely than the *Mejelle*, marking in effect a departure from the scholastic particularity of adherence only to a single *madhhab* in the country.[33] Although Turkey herself abandoned these laws, the works remained nevertheless in use in other Muslim countries and influenced subsequent legislation in the Arab Middle East. The new trend was even more visible in the 1929 Egyptian law (no. 25) of Personal Status which drew not only from the juristic legacy of the four major schools of *fiqh* but also from the opinions of individual jurists when this was deemed to be more conducive to public interest. The Syrian Law of Personal Status 1953 took a step further in this direction and relied not only on the resource of the leading schools but formulated new rules which had no precedent in existing *fiqh*. The Syrian legislation marked a new beginning for *ijtihād* through the modality of statutory legislation as it departed from the traditional pattern of *fiqh* being the concern primarily of private jurists and *mujtahids*. This neo-*ijtihādī* approach to legislation was followed, in the same decade, by similar attempts in Morocco, Tunisia, Iraq and Pakistan where statutory reforms were introduced in the traditionally *sharīʿah*-dominated laws of marriage, polygamy and divorce. The new reforms were often based on a novel interpretation of the Qurʾān on their related themes and were generally expressive of the desire to retain the Islamic identity of their laws but to revise and reform them in light of the prevailing social conditions.[34]

Notwithstanding their many advantages such as pragmatism, better classification and access, the new reforms were decidedly selective in that they confined the applied aspect of *fiqh* to matters of personal law which consequently isolated the wider legacy of *fiqh* in the other areas of *muʿāmalāt*. The new codes had also a restrictive effect in that they confined the judges and practitioners to specific provisions and minimized the need for them to maintain regular contact with the sources. They had

[33] For details see Al-Ashqar, *Tārīkh al-Fiqh* n. 1 at 187 ff; Muḥammad Fārūq al-Nabhān, *Al-Madkhal li'l-Tashrīʿ al-Islāmī*, 2nd. ed. (Kuwait: Dār al-Qalam, 1981), p. 365 ff; al-Qaraḍāwī, *al-Ijtihād*, n. 28, p. 134.

[34] For further detail on family law reforms in the Middle East see M.H. Kamali, *Law in Afghanistan* (Leiden: E.J. Brill, 1985), pp. 154 and 189; al-Qaraḍāwī, *Al-Ijtihād*, n. 28, p. 134 ff.

the effect of pushing the source materials of *fiqh* and its methodology further into the background so much so that their relevance to the applied laws of the land became even less visible than before.[35] The need was consequently felt for new measures to consolidate the rich legacy of *fiqh* into convenient collections which would stimulate scholarly interest in *fiqh* and respond to the needs and interest of both the legal profession and academic research. Hence the call by the Organization of Islamic Conference in 1951 for the compilation of a comprehensive encyclopedia of *fiqh,* following which several projects were taken up towards to that end. The University of Damascus began a project in 1956, and the governments of Egypt and Kuwait started their own projects in 1951 and 1971 respectively. The Egyptian and Kuwaiti encyclopedias are now running each at over thirty volumes and they are still continuing.[36]

These and other similar encyclopedic compilations have on the whole departed from the scholastic exclusivism of the traditional writings by treating all the major schools of *fiqh* (the four Sunni schools plus four Shīʿah - Jaʿfarī, Zaydī, ʿIbādi, and Ẓāhirī), strictly on the merit of their contribution and the information compiled is relatively free of sectarian bias.[37] Yet by the very terms of their reference, the encyclopedia collections were designed to consolidate rather than reform the existing *fiqh* and this has meant that the compilers were not in a position to address new issues at the level of *ijtihād.* They have undoubtedly provided valuable resources but they consist basically of an uncritical description of the scholastic heritage of *fiqh.* The need was then felt to supplement and enrich the scope of these endeavors by establishing a forum to facilitate collective *ijtihād* over new issues. A project was consequently undertaken by the OIC which led to the formation of the *Fiqh* Academy in Jeddah in 1981, and another by the Muslim League which led to the setting up of another *Fiqh* Academy at around the same time in Makkah India and Pakistan have each established a *Fiqh,* and a *sharīʿah* Academy of their own, and there are a number of international institutes and organization that undertake research in Islamic legal themes. An even earlier attempt along these lines was made by the Azhar University of Egypt in 1961 in the form of setting up the Islamic Research Academy *(Majmaʿ al-Buḥūth al-Islāmīyyah)* and subsequently by the King Abdul Aziz University which in 1977 established its International Centre for Islamic Economic Research.[38] The International Islamic University Malaysia, and that of Islamabad, started operations in

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[35] *Cf.* Al-Ashqar, n. 1, p. 201.

[36] *Ibid.,* p. 206 ff.

[37] *Cf.* Mannaʿ al-Qattān, *Al-Tashrīʿ waʾl-Fiqh fiʾl-Islām* (Beirut: Muʾassasah al-Risālah, 1405/1985), p. 345 ff.

[38] *Cf.* Al-Ashgar, *Tārīkh al-Fiqh* n. 1, p. 211.

the early 1980s and are currently engaged in building a stronger and more balanced infrastructure for specialized research efforts in Islamic Law.

VIII. Independent Reasoning *(Ijtihād)*

I have on numerous occasions in this essay accentuated the close link between *fiqh* and *ijtihād.* It now seems proper to characterize, however briefly, the basic concept of *ijtihād* and make a few remarks concerning *ijtihād* in modern times.

Ijtihād, which literally means striving, is defined as self-exertion by a *mujtahid* to the best of his or her ability in order to deduce the ruling of a particular issue from the evidence/indication that is found in the sources. It will be noted that this definition resembles closely that of the *fiqh* itself. This is so because *fiqh* and *ijtihād* stand essentially in the same relationship to the *sharīʿah,* which is to ensure the continued application of *sharīʿah* to the changing conditions of society. Whereas the revelation of the Qurʾān and Sunnah discontinued with the demise of the Prophet, *ijtihād* continues and it is as per Muḥammad Iqbāl's characterization "the principle of movement in the structure of Islam."[39] *Ijtihād* is a collective obligation *(farḍ kafāʾi)* of the Muslim community and a such it must never be abandoned. The duty is primarily addressed to all qualified *mujtahids* in the event where an issue arises but no urgency is felt over its ruling. The duty is fulfilled if it is performed by at least one *mujtahid,* but it becomes a personal obligation *(farḍ ʿaynī)* of the qualified *mujtahid* in urgent cases and events when there is fear that the cause of justice or truth my be lost if *ijtihād* is not immediately attempted. This would be the case when no other qualified person, other them a single *mujtahid,* can be found in the community to attempt *ijtihād.*[40]

In modern times *ijtihād* has basically occurred in the following three forms: through the modality of statutory legislation, in the form of *fatwā* by scholars and judges, and through scholarly research. Instances of legislative *ijtihād* can be found, as already noted, in the modern reforms of family law in many Muslim countries, particularly with reference to the fact that polygamy and divorce have both been made contingent upon a court order and are no longer the unilateral privilege, as it were, of the husband. The reformist legislation on these subjects derive some support from the Mālikī *fiqh* but they are essentially based on novel and equally

[39] Muḥammad Iqbāl, *The Reconstruction of Religious Thought in Islam* (Lahore: Shah Muḥammad Ashraf, reprint 1982). Chapter XI of Iqbāl's book which is on *ijtihād* bears the title "The Principle of Movement in the Structure of Islam."

[40] Yaḥya b. ʿAlī al-Shawkānī, *Irshād al-Fuḥūl min Taḥqīq al-Ḥaqq ilā ʿIlm al-Uṣūl* (Cairo: Dār al-Fikr, n. d), p. 235; Shaykh Muḥammad al-Khudārī, *Uṣūl al-Fiqh,* 7th ed. (Cairo: Dār al-Fikr, 1401/1981), p. 368.

convincing interpretation of the relevant portions of the Qur'ān.[41] We also note numerous instances of *ijtihād* in the views of *'ulamā'* and scholars, such as the collections of published *fatwās* (legal verdicts) by Muḥammad Rashīd Riḍā, and a similar collection of *fatwās* by the late Shaykh Maḥmūd Shaltūt, and many others. The Supreme Court of Pakistan decision in the well-known case of *Khurshīd Bibi v. Muḥammad Amīn* in 1967 on the subject of *khul'* divorce effectively declared *khul'* as a form of divorce that can take place at the initiative of the wife. This could be cited as an instance of judicial *ijtihād* which was also based on a novel interpretation of a Qur'anic passage on the subject.[42] To give just one example of scholarly views and contributions to the on-going efforts in *ijtihād,* I refer here to Yūsuf al-Qaraḍāwī's view which validates air travel by women without the company of their male relative. Women were not permitted to travel alone, according to the rules of *fiqh* that were formulated in pre-modern times. Al-Qaraḍāwī's conclusion is based on the analysis that the initial ruling was intended to ensure the physical and moral safety *(al-ṭuma'nīnah)* of the women concerned, and that modern air travel fulfils this requirement. The learned author has supported his view by an analysis of the relevant *Ḥadīths* on the subject and has arrived at a ruling which is better suited to contemporary conditions.[43]

The pace of change and the momentum it has gained in the age of technology and science can only serve as a reminder for more refined and imaginative *ijtihād* on an extensive scale. Two points need to be noted which add to our understanding of the conventional theory of *ijtihād*.[44] Firstly, *ijtihād* in modern times needs to be a collective endeavor that would combine the skill and contribution, not only of the scholars of *sharī'ah,* but of experts in various other disciplines. This is because acquiring a total mastery of all the relevant skills that are important to contemporary society is difficult for any one individual to attain. We need to combine *ijtihād* with the Qur'anic principle of consultation *(shūra)* and make *ijtihād* a consultative process, preferably as an integral part of the workings of the modern legislative assembly. The second point I wish to make is that *ijtihād* has in the past been seen as a juristic concept and a preserve, as it were, of the *mujtahid.* But *ijtihād* in the sense of self-exertion is a method of finding solutions to new issues in light of the guidance of *waḥy* (divine revelation). It is in this sense a wider proposition which may be exercised by the scholars of *sharī'ah* as well as experts in other disciplines, provided that those who attempt it acquire mastery

[41] For further details and examples see Kamali, *Law in Afghanistan,* n. 34, p. 158 ff; al-Qaraḍāwī, *Al-Ijtihād,* n. 28, p. 134 ff.

[42] P. L.D., 1967, S.C. 97.

[43] Al-Qaraḍāwī, *Al-Ijtihād,* n. 28, p. 126.

[44] There is chapter on *ijtihād* in Kamali, *Jurisprudence* n. 13, pp. 336-95.

of the relevant data, especially in the Qur'ān and Sunnah, on the subject. There is thus no reason why experts in Islamic economics and medicine, for example, could not carry out *ijtihād* in their respective fields of specializations.

Conclusion

Fiqh is essentially dynamic as it is endowed with the methodology and resources to move abreast with realities of social change. The long period of stagnation and *taqlīd* has undoubtedly hampered the process of its evolution and created a gap wide enough to put the relevance of *fiqh* to the concerns of modern society seriously in doubt. But *taqlīd* was prompted by a combination of factors including the persistent alienation of the *'ulamā'* and government throughout the many centuries of Umayyad and 'Abbāsid rule. The *'ulamā'* were consequently engaged in their academic pursuits with little involvement in the business of government. The rulers condoned this isolation under the umbrella of *taqlīd* as it left them with initiative and control over public affairs. For essentially similar reasons, one could hardly expect *fiqh* and *ijtihād* to remain a viable force in society during the colonialist domination of Muslims by European powers. It thus appears that the decline of *fiqh* in both these instances had, to a large extent, been due to lack of government participation and involvement in the development of *fiqh.* But the realities of power politics is no proof against the adaptability of *fiqh* and its capacity for growth. As one observer noted "there is no historical precedent to support the suggestion that the *shari'ah* cannot be revitalized. The process of its interpretation in the early days of Islam demonstrated that it is a not a fixed and permanent entity but capable of change to fit new circumstances."[45] The course of events in the twentieth century has shown once again that when the governments in power began to introduce legal reforms of family law, they were able to find the resources of Islamic law responsive to the prevailing needs of the community. In an attempt to ascertain the relevance of *fiqh* to contemporary issues, Weeramantry has observed that "a new era of Islamic Jurisprudence lies a head, as full of vitality as any of the ages past and as full of determination to make of the Islamic law an instrument relevant to the... problems conjured up by the present technological age."[46]

It would be less than realistic perhaps to expect the renewal of *fiqh* and *ijtihād* without a change of direction in the content and style of modern legislation. There is no visible role for *ijtihād* as a methodology and

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[45] Sadiq al-Mahdi "The concept of an Islamic State," in ed. Altaf Gauhar, *The Challenge of Islam* (London: Islamic Council of Europe, 1978), p. 114.

[46] J. Weeramantry, *Islamic Jurisprudence, An International Perspective* (Basingstoke: Macmillan, 1988), p. 123.

source in the constitutions and laws of many Muslim countries. Notwithstanding the fact that the *sharī'ah* is recognized, in some constitutions, as a principal (in the case of Egypt as "the principal") source of legislation, the constitutions and laws of Muslim countries are largely governed by methods that take their origin in Western rather than Islamic doctrines. Western style legislation has generally replaced the erudite juristic manuals of *fiqh* that used to dominate legal and judicial practice in Muslim societies. The classical theory of *ijtihād* had not envisaged this transition to the total dominion of the statute book. I have already pointed out some of the shortcomings of the theory of *ijtihād* in the modern context. What we need today is to integrate *ijtihād* into the working of the modern legislative assembly. Islamic resurgence in recent decades has demonstrated the demand of the Muslim masses that they should be governed by laws that are in harmony with their own culture and heritage. The nature of the issues tend to vary from one country to another but the general picture appears to be that *ijtihād* at the level of statutory legislation has yet to gain sufficient momentum to signify a change of direction in government policy and legislation.

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